

WRDavis

subject: Request for District Counsel Assistance:
Consents to extend the statute of limitations for assessment

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We respond to your memorandum seeking our opinion as to the proper parties and language to include on consents to extend the statute of limitations on assessment for [REDACTED], and subsidiaries for the taxable years [REDACTED] through [REDACTED]. Additionally, your memorandum requests our opinion as to the proper parties and language to include on consents to extend the statute of limitations on assessment of income tax attributable to partnership items of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], formerly [REDACTED], and [REDACTED] for certain taxable years. Our understanding of the facts, analysis of the issues, and conclusions are set forth below.

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ISSUES

1. What is the correct wording of a consent to extend the statute of limitations upon assessment of income tax for [REDACTED] and Subsidiaries (taxpayer) for its taxable years [REDACTED], [REDACTED], and [REDACTED]?

2. Who is the correct party to sign such a consent on behalf of the taxpayer for those years?

3. What is the correct wording of a consent to extend the statute of limitations upon assessment of income tax attributable to partnership items from the four following partnerships?

- a. [REDACTED] ([REDACTED]);
- b. [REDACTED] ([REDACTED]);
- c. [REDACTED], formerly [REDACTED] ([REDACTED]) ([REDACTED])
- d. [REDACTED] ([REDACTED])

4. Who is the correct party to sign a consent on behalf of each of the afore-listed partnerships?

CONCLUSIONS

1. [REDACTED] (formerly [REDACTED]) is severally liable for the entire amount of the consolidated liabilities of the [REDACTED] and Subsidiaries consolidated group for the tax years, [REDACTED], [REDACTED], and [REDACTED]. We recommend that you identify the taxpayer to which the consent to extend applies as "[REDACTED], formerly named [REDACTED] (E.I.N.: [REDACTED]), as alternative agent under Treas. Reg. § 1.1502-77T for the [REDACTED] & Subsidiaries consolidated group." Put an asterisk here and also at the bottom of the page, to reference the following footnote: "With regard to the consolidated tax liabilities of [REDACTED] & Subsidiaries consolidated group for the taxable years [REDACTED], [REDACTED], and [REDACTED]."

We also recommend that you obtain the consent of [REDACTED] (formerly [REDACTED]) to extend the statute of limitations on its liability as a transferee at law, because it is the transferee of certain assets of [REDACTED] (formerly [REDACTED]), and is liable as a transferee for [REDACTED]'s liabilities to the extent of the value of the assets it received in the transfer. Form 977 provides an appropriate vehicle for obtaining such consent. A copy of a blank Form 977 is attached.

2. An officer or other person authorized to sign returns for [REDACTED], is the person who can execute a consent as the common parent of the consolidated groups for the tax years at issue. An officer or other person now authorized to sign returns for [REDACTED] (formerly [REDACTED]), is the person who can execute a consent as to the [REDACTED]'s liability as a transferee.

3. For [REDACTED], [REDACTED], and [REDACTED], you must obtain the signatures of both the parent corporation, by an authorized representative thereof, on behalf of the subsidiary corporation, as well as of the subsidiary corporation, by an authorized representative of that corporation. The specific language to be used on the consents is as follows:

[REDACTED], formerly [REDACTED], by <insert name and title of authorized representative/officer signing for [REDACTED]>, on behalf of [REDACTED], formerly [REDACTED], Tax matters partner of <insert name of partnership to which this consent applies>.

Additionally, the following language is to be used for the consent of the Tax matters partner:

[REDACTED], formerly [REDACTED], Tax matters partner of <insert name of partnership to which this consent applies>, by <insert name and title of authorized representative/officer signing for [REDACTED]>.

For [REDACTED], you should modify the consent signed by an authorized representative/officer of [REDACTED] by making it "on behalf of [REDACTED], formerly [REDACTED], tax matters partner of [REDACTED], tax matters partner of [REDACTED], formerly [REDACTED]." Similarly, you should modify the consent signed by an authorized representative/officer of the tax matters partner as follows:

[REDACTED], tax matters partner, by [REDACTED], formerly [REDACTED], tax matters partner of [REDACTED], by <insert name and title of authorized representative/officer signing for [REDACTED]>.

4. Any officer authorized to act in behalf of [REDACTED], and any officer authorized to act in behalf of [REDACTED], can bind the partnership. See, generally, section

6062.

FACTS

1. and 2. Consolidated corporate income tax returns have been filed for [REDACTED], a Colorado corporation ([REDACTED]) and subsidiaries, EIN [REDACTED], for its taxable years ended December 31, [REDACTED] and December 31, [REDACTED], in accordance with section 1501 et seq. and the regulations thereunder. For the taxable year ended December 31, [REDACTED], [REDACTED], a Delaware corporation ([REDACTED]) and subsidiaries, EIN [REDACTED], filed a consolidated corporate income tax return. For these taxable years, [REDACTED] and [REDACTED] filed consolidated returns for itself and as the common parent agent for its affiliated companies.

[REDACTED] had been incorporated by [REDACTED], a Colorado corporation ([REDACTED]), under the laws of the state of Delaware on [REDACTED]. Thereafter, effective [REDACTED], [REDACTED] merged into [REDACTED] in a merger qualifying as a reorganization under section 368(a)(1)(F).

As part of the [REDACTED] transactions, [REDACTED] divided the majority of its businesses, all conducted by members of the consolidated group, into two groups: the [REDACTED] and the [REDACTED]. Additionally, in the merger of [REDACTED] into [REDACTED], each outstanding share of [REDACTED] common stock was converted into one share of [REDACTED] common stock of [REDACTED], and one share of [REDACTED] stock of [REDACTED]. Additionally, each outstanding share of Series [REDACTED] Preferred stock of [REDACTED] was converted into one share of Series [REDACTED] Preferred Stock of [REDACTED]. [REDACTED] continued to own all outstanding shares of [REDACTED], a Colorado corporation ([REDACTED]), the first-tier subsidiary of [REDACTED] under which all activities of the [REDACTED] were conducted, either by itself or its subsidiaries. Likewise, [REDACTED] continued to own all outstanding shares of [REDACTED], the first-tier subsidiary of [REDACTED] under which all activities of the [REDACTED] were conducted, either by itself or its subsidiaries.

On [REDACTED], [REDACTED] separated its [REDACTED] business from its [REDACTED] business by spinning off its [REDACTED] business. This was accomplished through a number of intervening steps, the relevant ones of which are

explained herein.¹ First, [REDACTED] incorporated a new subsidiary corporation under the laws of Delaware. Thereafter, [REDACTED] merged with and into the new Delaware subsidiary, and issued to [REDACTED] that number of shares of common stock equal to the number of [REDACTED] common stock of [REDACTED] then outstanding. This portion of the transaction has been pronounced as qualifying as a tax-free reorganization described in section 368(a)(1)(F).

[REDACTED] further effected the separation by contributing all of the issued and outstanding capital stock of the [REDACTED] subsidiaries, and certain other assets, including rights to the name, "[REDACTED]." Immediately thereafter, [REDACTED] distributed all of the issued and outstanding capital stock of [REDACTED] by exchanging each share for one share of [REDACTED] common stock of [REDACTED] held by its stockholders. As a result thereafter, only holders of the [REDACTED] common stock of [REDACTED] owned shares of [REDACTED] common stock, inasmuch as the [REDACTED] common stock of [REDACTED] was canceled after the exchange for [REDACTED] stock.

Thereafter, [REDACTED] was renamed [REDACTED], a Delaware corporation (New [REDACTED]) and [REDACTED] was renamed [REDACTED], a Delaware corporation, EIN [REDACTED].

The information provided does not indicate that any member of the affiliated group for the taxable years [REDACTED] through [REDACTED] incurred a dual consolidated loss, as contemplated by section 1503(d). For this reason, our analysis does not consider the effect in identifying the persons to execute consents.

3. and 4. Three of the partnerships for which you make inquiry identify [REDACTED], EIN [REDACTED], a member of the [REDACTED] prior to the [REDACTED] separation, as the tax matters partner of the partnerships: [REDACTED]; [REDACTED]; and [REDACTED]. The other partnership, [REDACTED], formerly [REDACTED] ([REDACTED]), identified [REDACTED] as the tax matters partner of that partnership.

The Form 872-P, "Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership" included for [REDACTED]

¹ The details of the [REDACTED] transactions are set forth in Priv. Ltr. Rul. 121669-97 (Mar. 27, 1998), a copy of which is attached.

reflected an unidentified signature, apparently of an officer of [REDACTED], on the line for Tax Matters Partner, identified as "[REDACTED]", General Partner and TMP, by [REDACTED], General Partner and TMP of [REDACTED]. The Form 872-P for [REDACTED] reflected the same unidentified signature on the line for Tax Matters Partner, identified as "[REDACTED]", Tax Matters Partner." On each Form 872-P, [REDACTED] and Subsidiaries ([REDACTED]), parent of [REDACTED] (subsidiary), was identified as an "Authorized Person," and an unidentified signature was included therein.

With the [REDACTED] separation, [REDACTED], was renamed [REDACTED], EIN [REDACTED]. Likewise, [REDACTED], the new name of [REDACTED], remains the common parent of [REDACTED].

ANALYSIS

1. and 2. Generally, section 6501(a) limits assessment of income tax to the period ending three years after the return for that tax period is filed. Among the exceptions to this three-year rule, the consent of both the Service and the taxpayer, in writing, to an extension of this period for assessment will extend this period when such an agreement is executed before the expiration of the assessment period. Section 6501(c)(4).

Generally, section 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return. Rev. Rul. 83-41, 1983-1 C.B. 349.

Where a corporate taxpayer stands as the common parent of an affiliated group of corporations, as defined by section 1504(a), it and the members of the affiliated group may, under certain circumstances, elect to file a consolidated return under section 1501 et seq.

Treas. Reg. § 1.1502-77(a) describes the scope of a common parent corporation's agency. There, with the exception of the consent of the members of the affiliated group to consent to filing a consolidated return as part of an affiliated group, and three other circumstances not relevant here, the regulation makes the common parent

the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. . . . The provisions of this paragraph shall apply whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time.

Treas. Reg. § 1.1502-77(a) (emphasis added).

Additionally, the regulation specifies the effect of a waiver given by the common parent, stating that

Unless the district director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made or levy or proceeding in court begun in respect of the tax for a consolidated return year shall be applicable--

(1) To each corporation which was a member of the group during any part of such taxable year,

and

(2) To each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under the provisions of §1.1502-75.

Treas. Reg. § 1.1502-77(c).

The corporation formerly known as [REDACTED], which was the common parent of the affiliated group filing consolidated return for [REDACTED], changed its name to [REDACTED], subsequent to the spin-off of [REDACTED]'s business conducted by the [REDACTED]. This being the case, Treas. Reg. § 1.1502-77 makes clear that the common parent for that year remains the agent for members of the group for that year so long as it does not go out of existence. Craigie, Inc. v. Commissioner, 84 T.C. 466 (1985).

Under Temp. Treas. Reg. § 1.1502-77T, alternative agents of the affiliated group may act for it where the common parent of the group ceases to be the common parent, regardless of whether the group remains in existence under Treas. Reg. § 1.1502-75(d). Here, it may be argued that the [REDACTED] name change of [REDACTED] to [REDACTED], and the [REDACTED] change in place of organization of [REDACTED] (a Colorado corporation) to [REDACTED] (a Delaware corporation), constitutes a cessation of the former common parent's

existence for the consolidated returns filed for [REDACTED], [REDACTED], and [REDACTED]. However, under that regulation, if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given serves as an alternative agent of the group. Temp. Treas. Reg. § 1.1502-77T(a)(4)(iv).

The regulation referenced therein specifically holds that "the common parent corporation shall remain as the common parent irrespective of a mere change in identity, form, or place of organization of such common parent corporation (see section 368(a)(1)(F))." Treas. Reg. § 1.1502-75(d)(2)(i). Under these facts, the mere change in identity effected by the merger of [REDACTED] into [REDACTED], and by the name change of [REDACTED] to [REDACTED], does not change these corporation's positions as the common parent of [REDACTED] and subsidiaries that filed consolidated returns for [REDACTED], [REDACTED] and [REDACTED].

We recommend that you submit the consents to one of the authorized officers of "[REDACTED], formerly named [REDACTED] (E.I.N.: [REDACTED]), as alternative agent under Treas. Reg. § 1.1502-77T for the [REDACTED] & Subsidiaries consolidated group." We further recommend that you identify the taxpayers whose limitations on assessment are to be extended by the consent by attaching a rider to the Forms 872 identifying each of the corporations that were included in the group for the year(s) for which the statute is extended.

As a result of the spin-off, [REDACTED] (New [REDACTED]) may be liable as a transferee at law for income tax of [REDACTED]'s consolidated group for years prior to the spin-off, to the extent of the assets transferred to it. To extend the Service's statute of limitations for asserting transferee liability against New [REDACTED], we recommend that you obtain its consent to an extension of the statute of limitations. To do so, you should use Form 977, "Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary." In the space for the transferee, identify New [REDACTED] as "[REDACTED], formerly named [REDACTED] (E.I.N.: [REDACTED])." Identify the transferor as "the [REDACTED] & Subsidiaries consolidated group," and the tax periods as [REDACTED], [REDACTED], and [REDACTED].

3. and 4. Each of the partnerships for which you seek advice had partners other than natural persons. For this reason, none of the partnerships could have qualified under the small partnership exception, set forth at section 6231(a)(1)(B)(i), that applied to partnership taxable years ending before [REDACTED]. For this reason, the unified partnership audit procedures, set forth at

section 6221 et seq., apply to the issues raised in your request.

In general, the period for assessing any income tax attributable to any "partnership item" or "affected item," as defined in section 6231(a)(3) and (a)(5), respectively, shall not expire before the date which is 3 years after the later of the date on which the partnership return for that taxable year was filed, or the last day for filing such return (i.e., the due date). Section 6229(a); Cambridge Research & Dev. Group v. Commissioner, 97 T.C. 287, 292 (1991).

The period of limitations for making such assessments may be extended by agreement. For one, it can be extended with respect to any partner by an agreement entered into by that partner and the Service. Section 6229(b)(1)(A).

Beyond that, an agreement can extend the period of limitations for all partners when the agreement is entered into by the Service and the tax matters partner, or by the Service and any other person authorized by the partnership in writing to enter into such an agreement. Section 6229(b)(1)(B).

Section 6231(a)(7), as relevant here, defines the tax matters partner of any partnership as the general partner designated as the tax matters partner as provided in regulations. Section 6231(a)(7)(A). Treas. Reg. § 301.6231(a)(7)-1(c) provides that "The partnership may designate a tax matters partner for a partnership taxable year on the partnership return for that taxable year in accordance with the instructions for that form." It appears that the partnerships here have done this.

Specific rules set forth the conditions under which the designation of a tax matters partner is terminated. In general such designations remain in effect until

- (i) The death of the designated tax matters partner;
- (ii) An adjudication by a court of competent jurisdiction that the individual designated as the tax matters partner is no longer capable of managing the individual's person or estate;
- (iii) The liquidation or dissolution of the tax matters partner, if the tax matters partner is an entity;
- (iv) The partnership items of the tax matters partner become nonpartnership items under section 6231(c) (relating to special enforcement areas); or
- (v) The day on which--

(A) The resignation of the tax matters partner under paragraph (i) of this section [Treas. Reg. § 301.6231(a)(7)-1];

(B) A subsequent designation under paragraph (d), (e), or (f) of this section; or

(C) A revocation of the designation under paragraph (j) of this section becomes effective.

Treas. Reg. § 301.6231(a)(7)-1.

In the case of the four partnerships for which advice is sought, we note that the tax matters partner of three of them, [REDACTED], changed its name as part of the spin-off of the [REDACTED]. However, that corporation did not undergo a liquidation or dissolution, and thus, remains the tax matters partner of the partnerships unless and until something changes that status (see, e.g., Treas. Reg. § 301.6231(a)(7)-1(c) through -1(g)).

The two consents contain signatures, presumably of officers or agents of [REDACTED], identified as an Authorized Person to consent to the extension. This conforms to the Service's policy to require the consent of the common parent corporation filing a consolidated return under section 1501 where the tax matters partner is a subsidiary member of the affiliated group filing the consolidated return. Because Treas. Reg. § 1.1502-77(a) makes the common parent the sole agent for each subsidiary in the group, and removes the authority of the subsidiary to act for itself with respect to its own tax liability, the Service takes the position that this consent is necessary to make the consent extending the statute of limitations binding on the tax matters partner and, by consolidation, on the common parent.

Please refer questions regarding this memorandum to Bill Davis at (303) 844-3258.

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By:


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Attachment